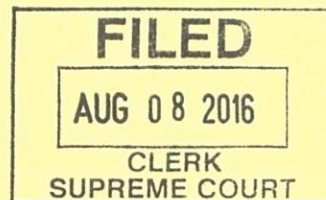


COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
2015-SC-000435-D



HUGHES AND COLEMAN, PLLC.

APPELLANT

v.

ANN CLARK CHAMBERS, EXECUTRIX OF
THE ESTATE OF JAMES W. CHAMBERS,
DECEASED

APPELLEE

REPLY BRIEF OF APPELLANT HUGHES AND COLEMAN, PLLC.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Peter L. Ostermiller".

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing has this 5th day of August, 2016, mailed to the following:

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Sam Givens, Jr.
Clerk, Court of Appeals
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A handwritten signature in black ink, appearing to read "Peter L. Ostermiller".

Peter L. Ostermiller

STATEMENT OF POINTS AND AUTHORITIES

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APPENDIX

Exhibit A. Hughes and Coleman Ex. 1, p. 138

ARGUMENT

The Appellee, hereinafter referred to as “Mr. Chambers,” has set out his version of the facts concerning the present case before this Court. As noted in the Brief for Appellant, hereinafter referred to as “Hughes & Coleman,” the Trial Court below made detailed Findings of Fact and Conclusions of Law following a bench trial. The Court of Appeals, exercising its appellate function, reversed the Judgment of the Trial Court. However, the Court of Appeals could not properly engage in a fact-finding function, which is a matter within the purview of the Trial Court.

The Trial Court found that the law firm acted in good faith in aggressively pursuing the personal injury claim of Mr. Underwood. However, the Court of Appeals concluded that Hughes and Coleman had forfeited any quantum meruit fee so that successor counsel, Mr. Chamber, would receive the entire fee. Mr. Chambers undisputedly relied on the work of Hughes and Coleman in settling the case after only several phone calls to the insurance company when the case was already in active negotiation at the time the law firm was terminated. The Court of Appeals, to reach its unjust and improper conclusion, gave a strained reading of Kentucky law regarding the attorney client relationship, and the proper actions of an attorney in pursuing the client’s case.

Mr. Chambers’ Brief represents a review of the Opinion of the Court of

Appeals, but, as discussed later in this Reply Brief, does not actually refute the case law from other jurisdictions which have addressed the “good cause” termination/ quantum meruit fee issue discussed in Hughes and Coleman’s Brief for Appellant. Since the Appellee’s Brief of Mr. Chambers essentially reviews the Court of Appeals’ Opinion, the Appellant, in this Reply Brief, will seek to avoid repeating matters already addressed in the Appellant’s Brief which refute the contentions set out in Mr. Chambers’ Brief.

Mr. Chambers, at the bottom of page 7 of his Brief, quotes a portion of a Case Note entry in the Needles system. As a matter of completeness, the full text of that Needles Note is attached hereto as Exhibit A. (H&C Ex 1, p. 138) The full Needles Note reflects that Mr. Travelsted discussed at length the case and had specific discussions with Mr. Underwood concerning settlement authority.

The good faith conduct of Hughes and Coleman regarding the handling of the No Fault benefits was presented at length before the Trial Court, and the Trial Court found that Hughes and Coleman had acted properly. For example, on January 22, 2013, Ms. Brown, one of the Hughes and Coleman attorney, advised one of the support staff at the law firm to check with Mr. Underwood to determine if he had any out-of-pocket medical expenses, mileage, caregiver services, etc., which would be subject to reimbursement under No Fault noting “lets release to him whatever we can justify releasing.” (H&C Ex. 1 p. 92)

Hughes and Coleman was terminated by Mr. Underwood, through his mother, on March 13, 2013. Her complaint in her email to the law firm noted that the money being held in escrow “could have been given to Travis when he needed the money.” However, the Trial Court expressly found that Mr. Underwood had not provided information and documentation requested by the law firm regarding any further distributions of the No Fault benefits to Mr. Underwood as provided for by statute.

I. Hughes and Coleman was Not Terminated for Good Cause

Mr. Chambers, on pages 11 and 12 of his Brief, seeks to distinguish away the discussion in the Appellant’s Brief of cases from other jurisdictions which have addressed this issue regarding the case by case determination of a quantum meruit fee following the termination of the attorney. Mr. Chambers points out that case law from Florida and Maryland is not “binding” on this Court, and that Kentucky has not expressly adopted the section of the Restatement referred to in the Brief for Appellant. That is correct, but misses the point. Of course, authority from another jurisdiction is not “binding” on this Court. However, such case law is highly instructive regarding how a quantum meruit determination should be made following the termination of the attorney by the client.

In 2006, when this Court rendered Baker v. Shapero, 203 SW3d 697 (Ky 2006), this Court expressly reversed previous case law in Kentucky and adopted

the majority position from other jurisdictions in the United States, This Court noted that then-prevailing law in Kentucky regarding the compensation of an attorney discharged without cause was “the extreme minority position” in the United States. This Court stated that it was adopting an approach “in accordance with the vast majority of other jurisdiction that have addressed this issue...”. In short, this Court’s express purpose in Baker v. Shapero was to bring Kentucky into the “vast majority” of jurisdictions as to how the quantum meruit issue is to be determined.

Since Kentucky has elected to be within the majority of jurisdiction on quantum meruit fee determination, how Courts of last resort in other jurisdictions have addressed this issue is instructive in resolving the issue before this Court.

Mr. Chambers, contrary to the evidence presented and the Findings of the Trial Court, contends that Hughes and Coleman did not properly communicate with its client concerning the No Fault benefits. The law firm directly communicated with Mr. Underwood regarding the law firm’s receipt of those No Fault benefits from the No Fault carrier, and obtained express written authorization from the client to do so. As set out in length in the Brief already filed on behalf of Hughes and Coleman, the Court of Appeals disregarded the Findings of the Trial Court and the actual evidence presented as to the extensive communications which the law firm had with Mr. Underwood during the representation.

For Mr. Chambers to argue on page 14 of his Brief that Mr. Underwood was “kept out” of the decision making regarding his No Fault benefits is not supported by the actual record. The law firm appropriately conferred with him at the beginning and during the representation regarding the handling of the No Fault benefits.

Mr. Chambers, on page 15 of his Brief, quotes from the affidavit of Ms. Underwood, the mother of Mr. Underwood, the client. At trial, at the election of Mr. Chambers, and by agreement with Hughes and Coleman, the Affidavits of Mr. Underwood and his mother, Ms. Underwood, were filed as part of his proof. However, the Trial Court was not required to accept the truth, accuracy or completeness of the Affidavits of Ms. Underwood and Mr. Underwood in deciding the case. The weight and credibility of testimony and evidence presented is a matter within the discretion of the Trial Court. Mr. Chambers complaining before this Court that the Trial Court did not accept the testimony, by Affidavit, of Ms. Underwood, is not a proper basis for review of the Trial Court’s action before this Court.

Mr. Chambers, on page 16 of his Brief refers to the March 14, 2013 email from Ms. Underwood to the law firm regarding the No Fault benefits. However, the Trial Court was not required to accept as true the allegation made by Ms. Underwood in her email to the law firm. Again, this is a matter of weight and

credibility of the evidence and testimony presented.

The contention of Mr. Chambers that Hughes and Coleman was terminated by Mr. Underwood for good cause, and that the termination was sufficient to constitute a complete fee forfeiture, is contrary to the facts of the present case, as found by the Trial Court, and not supported by a review of prevailing law and a consideration of case law from other jurisdictions which have looked at this issue.

II. Hughes and Coleman Did Not Maintain a Position Unsupported by Law or Adverse to its Client under the Facts of this Case and Prevailing Case Law.

Mr. Chambers, on pages 17 and 18 of his Brief, contends that Hughes and Coleman dealt with improperly and without conferring with Mr. Underwood regarding the law firm's receipt of his No Fault benefits and the circumstances surrounding the distributions of those benefits. However, as discussed in the Brief for Hughes and Coleman previously filed herein and as supported by the Findings of Fact made by the Trial Court, Hughes and Coleman's receipt of the No Fault benefits was with the knowledge and consent of Mr. Underwood, and that distributions were made during the representation by Hughes and Coleman as provided for by statute. Furthermore, the expert testimony of Mr. Coleman, (no relation to Lee Coleman of Hughes and Coleman), an attorney experienced in motor vehicle accident law and its application by attorneys representing claimants, established the good faith conduct of Hughes and Coleman regarding the handling

of the escrowed funds.

Progressive, the No Fault carrier, distributed the balance remaining of the No Fault benefits to Hughes and Coleman to make any further distributions of those No Fault benefits as provided for by statute. In the present case, the No Fault benefits, when forwarded by Progressive to Hughes and Coleman, was appropriately placed in the escrow account of Hughes and Coleman. The complaints of the Court of Appeals regarding the handling of those No Fault benefits, in which Hughes and Coleman took no fee, is not the type of conduct which would support the complete forfeiture of a quantum meruit fee.

Mr. Chambers, in his Brief, recites the analysis applied by the Court of Appeals in reversing the Judgment of the Trial Court. The Brief for Hughes and Coleman previously filed in this action reviewed, in detail, the arbitrary analysis used by the Court of Appeals in reaching an unreasonable and strained application of Kentucky law to support the complete forfeiture of an attorney's fee to Hughes and Coleman under a quantum meruit analysis. Hughes and Coleman properly conferred with Mr. Underwood regarding the scope of representation and the legal representation which was provided to him in the pursuit of his claim for damages.

The evidence and testimony presented at the Trial Court showed that Hughes and Coleman spent much time and effort concerning the receipt and distribution of the No Fault benefits. As the Trial Court found, and is established

by the evidence, Mr. Underwood did not provide to the law firm any additional documentation which would support additional distributions of those funds which Hughes and Coleman was holding in escrow. No doubt Hughes and Coleman wishes that Mr. Underwood had fully cooperated with the law firm in providing the information and documentation requested concerning his No Fault benefits. That Hughes and Coleman could not simply unilaterally release the No Fault benefits to Mr. Underwood during the representation did not create a conflict of interest.

The Court of Appeals, in its flawed legal analysis, created a conflict when none existed. As discussed at length in the Brief previously filed on behalf of Hughes and Coleman, the analysis of the Court of Appeals concerning an attorney's handling of escrowed funds would preclude attorneys from ever holding funds in escrow in which the client and third party would possess of a claim to the funds. The Court of Appeals, in its rush to find fault in the actions taken by Hughes and Coleman, used an overly-broad brush in criticizing the manner in which the law firm held the escrowed funds.

III. There Were No Conflict Of Interest In The Actions Of The Law Firm In Relation To Its Duties To Its Client, Mr. Underwood, Regarding The Holding In Escrow Of The No Fault Funds.

The third Argument set out by Mr. Chambers in his Brief is somewhat question-begging. He argues that the attorney client contract between Hughes and Coleman and Mr. Underwood did not authorize the law firm to “place itself in a conflict of interest with its own client.” Of course, no agreement between an attorney and a client may authorize a non-waivable conflict of interest. But, the contract in the present case did not do so.

Hughes and Coleman receipt of the No Fault benefits from the No Fault carrier, Progressive, and placing those funds in its escrow account, was a common practice as confirmed by the expert testimony by attorney Reford Coleman, as found and held by the Trial Court. As a result, the action of Hughes and Coleman was not contrary to established practice, but was consistent with such practice. Such conduct by Hughes and Coleman was in good faith and would not support the contention that Hughes and Coleman had been terminated for good cause.

CONCLUSION

Based on the foregoing and the Brief for Appellant, previously filed herein, Hughes and Coleman, respectfully submits that the Court of Appeals has misapplied prevailing Kentucky law and rendered its Opinion based on facts not found by the Trial Court. The Court of Appeals erred in concluding that the

conduct of Hughes and Coleman, as found by the Trial Court, supported a complete forfeiture of any quantum meruit fee to the law firm.

Hughes and Coleman respectfully requests that the Opinion of the Court of Appeals be reversed and that the Judgment of the Trial Court be affirmed.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Peter L. Ostermiller", written in a cursive style.

Peter L. Ostermiller
Counsel for Appellant